No. 06-1184

IN THE

Supreme Court of the United States

SPRINT NEXTEL CORPORATION &
T-MOBILE USA, INC.,
Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

JAMES BRADFORD RAMSAY
GRACE SODERBERG
Assistant General Counsel
NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS
1101 Vermont Ave. NW
Suite 200
Washington, DC 20005
(202) 898-2207

Counsel for National Association of Regulatory Utility Commissioners

WILLIAM L. VALLÉE JR. *
Principal Attorney
OFFICE OF CONSUMER
COUNSEL
STATE OF CONNECTICUT
10 Franklin Square
New Britain, CT 06051
(860) 827-2905

Counsel for National Association of State Utility Consumer Advocates

* Counsel of Record

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I. THE UNITED STATES CORRECTLY CONCEDES THAT REVIEW OF THE ELEVENTH CIRCUIT'S DECISION IS UNWARRANTED.

The United States is correct on several essential points addressed in its brief: *First*, the petition for a writ of certiorari **should be denied**. SG Br at 22; Br. in Opp. at 1-2, 11. As Respondents previously noted, the Court grants certiorari "only for compelling reasons," and such reasons are not presented by the Petitioners. Br. in Opp. at 11, *quoting* Sup. Ct. R.

10. *Second*, the Eleventh Circuit's decision does not directly conflict with any decision of this Court or any other circuit court of appeals and no grounds for review are presented on this basis. SG Br. at 19; Br. in Opp. at 12, 22-27. *Third*, the United States concedes that there are no issues of overriding national concern that the Court should settle at this time. *Finally*, while the United States and the Respondents obviously disagree over the correctness of the Eleventh Circuit's decision, the United States tacitly concedes that error below, whatever it might be, does not warrant review by the Court. Br. in Opp. at 11.

In short, both the United States and Respondents agree that none of the criteria for discretionary review are met in this case. Petitioners have not shown to the contrary.

II. PETITIONERS' RELIANCE ON SELECTED ELEMENTS OF THE UNITED STATES' BRIEF PROVIDES NO BASIS FOR REVIEW.

Couched as a response to the Solicitor's arguments, Petitioners resurrect a two-part argument to support certiorari: First, Petitioners again claim that this case "presents an important and recurring issue involving . . . what role, if any, does the presumption against preemption play in cases where an agency's interpretation of a statute with preemptive effect is subject to *Chevron*." Pet. Supp. Br. at 3. Second, Petitioners assert that the Court should review despite the fact that on remand the FCC may attempt to preempt State regulation of carrier line item charges based on theories other than express preemption. *Id.* at 4. In presenting their arguments, Petitioners raise a number of peripheral or irrelevant

issues. In the end, however, none of the Petitioners' contentions have merit.

A. The Eleventh Circuit Correctly Held That State Laws Controlling The Presentation Of Line Item Charges On Wireless Carriers' Bills Are Not Preempted By 47 U.S.C. § 332(c)(3)(A)

Although the United States believes that the court of appeals "ignored" (SG Br. at 16), or "overlooked" (*id.* at 10), elements of the FCC's declaratory ruling, an examination of the court's decision below demonstrates that the Eleventh Circuit quite properly utilized standards of statutory construction and agency review to unanimously vacate the FCC's faulty analysis. Pet. App. 1a-33a, 36a-37a. The Eleventh Circuit carefully followed a detailed analytical framework for its review of 47 U.S.C. § 332(c)(3)(A) and the FCC's Declaratory Ruling consistent with the two-step process established by this Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Pet. App. 12a. The Eleventh Circuit's decision ensures that Congress' express reservation of State authority over "other terms and conditions" of wireless service continues to have meaning.

Although it recognized that the term "rates charged" is not defined in the Act, the Eleventh Circuit reasonably concluded that "the meaning of this term is clear in this context" and that "a straightforward reading of the complementary phrases 'regulate entry of or rates charged' and 'other terms and conditions' . . . evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states. . . ." Pet. App. 25a. Significantly, the court recognized that accepting the

FCC's rationale would confer virtually unlimited discretion on the agency to preempt virtually any State oversight of wireless carriers' "other terms and conditions" of service. This reading, the Eleventh Circuit concluded, cannot be squared with the express Congressional intent that States retain significant authority over "other terms and conditions of" wireless service, consistent with the broad authority they exercised over such service prior to the 1993 amendments to 47 U.S.C. § 332(c)(3)(A). The Eleventh Circuit specifically found that the FCC "failed adequately to explain its conclusion that a line item falls within the definition of 'rates' because the use of line items has an alleged direct effect on rates." Pet. App. 28a. The United States ignores this aspect of the court's decision, which recognized—correctly—that the FCC's analysis would vastly expand its authority because **any State regulation can be said to affect wireless carriers' rates.**

The United States further claims that the appeals court "invoke[s] a parade of horribles that the Commission had expressly disavowed." SG Br. at 18. But nowhere does the United States explain why the FCC's overbroad rationale, if upheld on review, would not necessarily permit the FCC to preempt "even powers historically retained by the states, such as the imposition of state taxes . . . so long as they impact 'how carriers recover [the] costs of doing business.'" Pet. App. 32a, *quoting TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). As the Eleventh Circuit correctly noted, the FCC's overbroad interpretation of 47 U.S.C. § 332(c)(3)(A) in favor of its own authority over wireless "rates" necessarily would allow the agency "indefinitely to expand its authority without regard to the mandate by Congress that 'other terms and conditions' remain the realm of state regulation."

Id. The FCC's interpretation of its authority on its face, confounds Congress' express intent and is thus a clear violation of a "cardinal principle of statutory construction. . . ." *Id.*

Both Petitioners and the United States overstate the impact of the Eleventh Circuit's decision by embellishing the possible harm from States having the authority to require or prohibit inclusion of line items on wireless bills, specifically citing to local taxes and Universal Service Fund payments as examples. SG Br. at 7-8; Pet. Supp. Br. at 1-4; *but see* Br. in Opp. at 13 *et seq.* (rebutting claims of hidden taxes and USF payments). Further, Petitioners renew their unsubstantiated claims that the Eleventh Circuit's decision will encourage state governments to hide taxes on wireless service by preventing wireless carriers from being able to bundle and offer national rate plans. Pet. Supp. Br. at 1. As the Respondents earlier argued, the breadth of the FCC's ruling preempting any State laws requiring or prohibiting line items, including State or local taxes or regulatory fees, carries the effect of the FCC ruling far beyond the scope of the initial scope of the inquiry.

B. *Watters* Does Not Reach The Question Whether Preemptive Agency Rules Should Receive *Chevron* Deference.

Petitioners resurrect their claims that the Court's ruling in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) warrants granting certiorari. Pet. Supp. Br. at 3-4, 7. The United States, by omitting any reference to *Watters* in its brief—despite Petitioners' express reliance on it in support of review (Pet. Reply Br. at 3-4, 7), implicitly rejects Petitioners' claims.

Watters expressly does not reach the question of whether agency regulations preempting State law should receive *Chevron* deference. Petitioners simply disregard the Court's explicit ruling that "under our interpretation of the statute, the level of deference owed to the regulation is an academic question." *Watters*, at 1572. The Eleventh Circuit's decision in no way conflicts with the Court's decision in *Watters*.

The *Watters* decision and the case below address different types of preemption. Contrary to Petitioners' suggestion, *see* Pet. Supp. Br. at 3, the Sixth Circuit decision affirmed by *Watters* did not indicate that the presumption against preemption is always inapplicable to agency actions. *See* SG Br. at 19-21, discussing preemption in context of pending FCC rulemaking. Indeed, the Sixth Circuit noted that the State "correctly asserted that there is a presumption against preemption in areas of regulation typically left to the states" but concluded the presumption did not apply to "'conflict preemption' . . . where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Watters v. Wachovia Bank, N.A.*, 431 F.3d 556, 560 & n.3 (6th Cir. 1982), *citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153-54 (1982). Of course, here Congress has expressed its purpose and objective to **preserve** State regulation of "other terms and conditions"—as opposed to "rates" and "entry"—for wireless service.

C. Petitioners' Other Arguments Fail To Provide Any Additional Basis For Review.

The United States argued the Court need not review the Eleventh Circuit's decision because "the agency on remand will have an opportunity to decide

whether to bar state line-item regulation on the basis of conflict preemption. . . ." which is "entirely distinct from that governed by Section 332(c)(3)(A). . . ." SG Brief at 19. In response, Petitioners assert that the Eleventh Circuit would likely reverse such a holding. Pet. Supp. Br. at 4. Petitioners thereby implicitly concede the Solicitor General's point. It is not certain what the FCC will do on remand or in the pending rulemaking or how the Eleventh Circuit or another appeals court will address the eventual FCC decisions or their rationale. The only thing certain is that any subsequent FCC's actions will be appealable.

Petitioners also raise the issue of the FCC's "failure," to date, to decide whether wireless carriers' early termination fees are "rates charged" under 47 U.S.C. § 332(c)(3)(A) and so preempt any State regulation. Pet. Supp. Br. at 6. Petitioners even suggest that the unsettled status of the Eleventh Circuit's decision is the cause of such "delay." *Id.* Petitioners' claims are entirely unsubstantiated. In any event, Petitioners' suggestion that this Court's review of the Eleventh Circuit's decision could resolve the pending FCC proceedings regarding early termination fees, is effectively a request for the Court to issue an advisory opinion since, by definition, there is no case or controversy arising from FCC inaction.

CONCLUSION

The United States chose not to petition the Court for review of the Eleventh Circuit's decision, chose not to support Petitioners' request for review, and affirmatively waived any right to file a brief in support of Petitioners' request. The United States' inaction strongly suggested it did not believe review

was warranted. Now, in response to the Court's invitation and even **after a second, more exhaustive examination of the petition and the decision below**, the United States has again concluded that this case does not warrant review. Petitioners have failed on all counts to make the case for review, and for the reasons set forth in the briefs filed by Respondents and the United States, the petition for review should be denied.

Respectfully submitted,

JAMES BRADFORD RAMSAY
GRACE SODERBERG
Assistant General Counsel
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1101 Vermont Ave. NW
Suite 200
Washington, DC 20005
(202) 898-2207

Counsel for National Association of Regulatory Utility Commissioners

WILLIAM L. VALLÉE JR. *
Principal Attorney
OFFICE OF CONSUMER COUNSEL
STATE OF CONNECTICUT
10 Franklin Square
New Britain, CT 06051
(860) 827-2905

Counsel for National Association of State Utility Consumer Advocates

* Counsel of Record

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